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Ralph Sharp Brown: The Center Holds

Louis H. Pollak†

The close of the 1982–83 academic year marked the end of an important chapter in the life of the Yale Law School—the thirty-seven years in which Ralph S. Brown and Boris I. Bittker were active members of the faculty. At the dinner on April 15, 1983, at which the School paid tribute to these two extraordinary scholars and teachers, Elias Clark and I—who had been students when Professors Bittker and Brown joined the faculty in 1946—were privileged to speak about our mentor-friends. Eli talked about Boris; Eli's very moving tribute was reprinted in a recent issue of the *Journal*.¹ I am grateful to the *Journal* for inviting me to write a few paragraphs about Ralph; what follows draws upon, but does not duplicate, what I said last April.

Ralph Brown is an exemplary teacher. Steadily broadening his professional horizons, he has taught his way across a curriculum which he himself has done much to enlarge.² But whatever the course or seminar Ralph offers, the same enthusiasm for the teaching process suffuses the classroom. Ralph's students quickly discover that they and their instructor are engaged in a joint enterprise in which the stakes are high (in a vital academic colloquy, there are no simple questions or easy answers) and the responsibilities higher still. Words, as the medium of intellectual exchange, are sacred; so too is rationality, the lubricant of that exchange. The instructor is the senior partner in a professional undertaking of great moment, for the client is truth.³

Ralph Brown is an exemplary scholar. Painstaking research, surgically

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1. Clark, *Boris I. Bittker: Colleague and Friend*, 93 *YALE L.J.* 199 (1983).

2. According to my assuredly incomplete recollection, Ralph has over the years offered one or more courses in each of the following fields: antitrust, conflicts, copyright, corporations, education law, environmental law, regulated industries, and torts. Boris Bittker is similarly eclectic and omniscient. The Brown-Bittker pattern of teaching everything in sight is to be contrasted with the practice—which I think characterizes most of us who have been teachers of law—of tending to limit one's classroom offerings to two or three fields in which, by the close of the apprentice years, one feels both interested and comfortable.

3. I did not have the good fortune of taking a class with Ralph. What appears in the text is a distillation of scores of conversations I have had with Ralph's students. And it accords precisely with my own experience in working with Ralph on the numberless problems we have addressed as faculty colleagues.

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precise analysis, and absolute integrity in putting the pieces together—these are the hallmarks of Ralph's writings. They are the qualities that have given enduring authority to the definitive work, *Loyalty and Security*,⁴ which, in the late 1950's, in the waning light of the McCarthy era, probed the most searching First Amendment and procedural due process issues of our time. The same qualities have informed all of Ralph's later works, including his formidable contribution to the law of copyright.⁵

Ralph Brown is an exemplary citizen. He tackles the jobs that need doing, not because they are fun—though he has a knack for making them fun—but because they have to be performed. There is an intrinsic unity about the principal administrative responsibilities he has taken on at Yale: As periodic interim director of the Law Library, as Associate Dean of the Law School,⁶ and as presiding officer of the Yale University Press, Ralph has always been concerned, philosophically and pragmatically, with seeing to it that worthwhile books and worthwhile learning are effectively available. Ralph's Yale citizenship also connects directly with the endeavors to which he has long devoted himself on the national scene. He has been a leading member of the Board of the American Civil Liberties Union almost forever: The memory of person runneth not to the contrary. And his services to the American Association of University Professors, of which he has been President, likewise trace to a remote past and continue to this very day: As these paragraphs go to press, Ralph is actively engaged as General Counsel of the A.A.U.P.

In all his activities, the integrity of the mind and of the legal processes and institutions that protect the mind have been uppermost. The best evidence of this is to be found in what Ralph himself has written. The eloquent closing paragraphs of *Loyalty and Security* remind us how much was at hazard a generation ago—and how vulnerable, even today, are the ramparts we watch:

The lawyer inclines to put his trust in the courts and the Constitution. But we should not expect the courts to carry the whole burden, and in the last decade, lacking leadership from the Supreme Court, the courts have done very little. Even in demanding the elements of procedural due process, an issue on which the judges should

4. R. BROWN, *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* (1958).

5. These qualities also characterize the writings of Professor/Justice Benjamin Kaplan, co-author of the Kaplan-Brown copyright casebook.

6. At Boris' suggestion, and with a strong assist from President Kingman Brewster, I persuaded Ralph to serve as Associate Dean in 1965-70. Looking back on Ralph's magnificent, unsung efforts during those years of travail, Boris and Kingman would, I am certain, agree with me that inducing Ralph to assume that thankless deanship was one of the best things anyone has done for the Yale Law School.

be most decisive, their role has been timorous. This is deplorable; but it is not surprising, when the executive, the legislature, and the people have all been hell-bent for repression. Now, as we learn to live with the cold war, there has been some reduction of internal tension, and the judiciary will perhaps take a modest lead. Its capacity for reform is, however, limited. There are few constitutional imperatives in the field of employment tests, and the evolution of new imperatives is a cautious process; witness the [lengthy] gestation of the principle that racial segregation in public education cannot lawfully exist. Whether our guidance is to come from the spirit or the letter of the Constitution, the other branches of government have a responsibility equal to the courts'. If statutes and executive orders were properly conceived and executed, the courts would have little to do.

The ultimate responsibility patently lies on all of us. First and last this is a problem of democratic self-restraint. I assume that our democratic theory does not rest on the naked power of majorities. Through the Constitution, the majorities of any given moment have undertaken to withhold some of their power to repress minorities. But when unstable world politics threaten the survival of a life of abundance and promise, we throw off self-restraint. Those who are not for us are against us. Radicals, once tolerated, become disloyal subversives. The ancient weapons of repression are unsheathed. The Bill of Rights, we are told, would probably fail of re-enactment today. No single manifestation of this spirit, whether employment tests, or prosecutions for sedition, or banishment, is likely to be checked in its course until responsible opinion calls a halt all along the line.

It would, however, be naive to suppose that "all of us," even though we are responsible as citizens, are going to experience a spontaneous impulse to reform. Many are, and always will be, indifferent to these problems. Others consciously or unconsciously reject toleration. Confident of their own absolutes, they find virtue in imposing conformity. There remain the large numbers who, though they have a strong concern for individual freedom and dignity, have been overawed. Chilled by the insecurity of the atomic age, they have not questioned the demands that have been made in the name of security. Valuing loyalty, they have not challenged specious definitions of disloyalty. Detesting communism, they have swallowed the excesses of anticommunism. On these people I urge the two dominant conclusions of this book. First, that loyalty and security tests have been practiced with too much rigor and too little humanity. Second, that these tests needlessly impair the great freedoms of belief, of speech, and of association enshrined in the First Amendment.⁷

7. R. BROWN, *supra* note 4, at 484-85 (footnotes omitted). I suppose it is arguable that the *Law*

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Last year Ralph Brown delivered the annual Finkelstein Lecture on Copyright at Cardozo Law School. He entitled the lecture "The Widening Gyre," drawing on Yeat's "The Second Coming" to make the point that certain aspects of copyright law are losing coherence. One senses, however, that the lines which, at the beginning and end of this lecture, Ralph quoted from the great poem have a wider reference than the extent to which copyright should protect derivative works. One senses Ralph's enduring concern with threats to the central constitutional order:

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
. . . .
The best lack all conviction, while the worst
Are full of passionate intensity.⁸

But Ralph is not an Irish pessimist. Moreover, when the falcon is in trouble, Ralph doesn't write a poem. He writes an essay or a book, or gives a lecture, or wheels the A.A.U.P. and/or the ACLU into action. With Ralph in charge, the center holds.

Journal and I, in publishing so lengthy an excerpt, are infringing the copyright of Professor Brown and/or Yale University Press. In the past, I have found it prudent to consult Professor Brown before lifting extravagant amounts of the writings of others. In this instance, I felt that I was compelled to rely on my own lawyering. I intend, therefore, respectfully to submit, to whatever gimlet-eyed tribunal may become seized of the matter, that due consideration of "the purpose and character of the use," 17 U.S.C. § 107(1) (1982), "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," 17 U.S.C. § 107(3) (1982), and most particularly, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4) (1982), should lead to the conclusion that this is "fair use."

8. W. YEATS, *The Second Coming*, in *THE COLLECTED POEMS OF W.B. YEATS 184-85* (1956).

Works of Ralph S. Brown

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15 STAN. L. REV. 406 (1963), reviewing H. PACKER, EX-COMMUNIST WITNESSES: FOUR STUDIES IN FACT FINDING (1962).
72 YALE L.J. 625 (1963), reviewing C. FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION (1961).
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54 COLUM. L. REV. 144 (1954), reviewing E. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953).
57 YALE L.J. 894 (1948) reviewing THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).
56 YALE L.J. 180 (1946), reviewing H. HAZLITT, ECONOMICS IN ONE LESSON (1946); P. DRUCKER, CONCEPT OF THE CORPORATION (1946).